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8
9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 OAKLAND DIVISION
12

13 SUCCESSFACTORS, INC.,

14 Plaintiff,

15 v.

16 SOFTSCAPE, INC.,

17 Defendant.

Case No.: C-08-1376 (CW)

**DEFENDANT SOFTSCAPE, INC.'S
BRIEF ADDRESSING DISCOVERY
DIFFERENCES**

Date: April 14, 2008

Time: N/A

Place: Courtroom 2

Honorable Claudia Wilken

1 **I. INTRODUCTION**

2 The parties have made substantial progress, due in large part to a considerable amount of
3 effort expended by both sides in meeting and conferring to agree on the terms of an Evidence
4 Protection Order, a form of Protective Order, and a schedule for discovery and the parties' Initial
5 Disclosures in this case. As a result of these efforts, the disputes that remain are limited to four
6 issues that are addressed below.¹

7 **II. SCOPE OF PROPOSED EVIDENCE PRESERVATION ORDER**

8 Under the Federal Rules of Civil Procedure, the parties have an obligation to reasonably
9 identify and locate, and then preserve potentially relevant evidence, including but not limited to
10 Electronically Stored Information. Softscape takes its preservation duties seriously, is complying
11 with its legal obligations, and has taken the following steps:

- 12 • A reputable electronic discovery firm, FTI Consulting, Inc., has been retained to
13 assist Softscape to identify, locate and preserve Electronically Stored Information;
- 14 • Forensic ("mirror") images have been made of all computers known to have been
15 used to create or modify the Presentation at issue in this case;
- 16 • Forensic images have been made of all computers known to have been used to
17 access SuccessFactors' ACE 275 Marketing Demo;
- 18 • Forensic images have been made of five Softscape servers – the Exchange Server,
19 the Exchange Front End Server, the Intranet Server, the Business Intelligence
20 Server, and the Server containing all employee "home directories";
- 21 • Backup tapes have been preserved from February 8, 2008 to the present;
- 22 • Recycling of Softscape's backup tapes has been suspended;
- 23 • Any business practice that may involve routine destruction, recycling, relocation or
24 mutation of any potentially relevant material has been discontinued and/or
25 disabled; and

26 ¹ Softscape and its counsel have participated in good faith in numerous meet and confer communications
27 with opposing counsel since March 28, 2008, the result of which has been agreement on all issues but the
28 four specified in this brief. If the Court wishes Softscape to address the specifics of the meet and confer
process, or any individual communication with opposing counsel, Softscape and its counsel can and
certainly are prepared to do so.

- All Softscape employees have been instructed to preserve all relevant information related to this case.

See Declaration of Susan Mohr ("Mohr Decl."), ¶¶ 1 – 7. In addition to the measures it has taken thus far to preserve relevant evidence, Softscape has provided extensive information to opposing counsel regarding Softscape's IT infrastructure and preservation efforts. See Mohr Decl., ¶¶ 11 – 13.

In the event the Court determines this is an appropriate case for the entry of an evidence preservation order, Softscape has also proposed a form of order (attached hereto as Exhibit A). This order is largely modeled on the preservation order issued by Chief Judge Vaughn Walker in the NSA case (*compare* Ex. A with *In re: NSA Telecomm. Records Lit.*, 06-01791 (Docket No. 393) (N.D. Cal. Nov. 6, 2007)), and consistent with this Court's previous orders. See, e.g., *In re NVIDIA Corp. Sec. Lit.*, 02-00853 (Docket No. 27, ¶¶ 13-14) (N.D. Cal. June 11, 2002); *Creative Sci. Sys. v. Forex Capital Mkts., LLC*, 04-03746 (Docket No. 9) (N.D. Cal. Sept. 13, 2004). In accordance with these and similar evidence preservation orders, Softscape's form of order requires the parties to take reasonable steps to identify, locate and preserve documents, data, tangible things, and other discoverable materials that are reasonably known to exist and are related to the issues in the case. See Ex. A, ¶ 1. It also requires that counsel direct their respective clients to discontinue any business practice that involves the routine destruction, recycling, relocation or mutation of "documents" as that term is defined in the order, and for each Party's lead counsel to submit to the Court, under seal, a statement that the clients have been so instructed. Ex. A, ¶¶ 6-7.

SuccessFactors has proposed a form of order which contains additional provisions not found in other orders of this type and that exceed the preservation requirements imposed by federal law. More importantly, from a computer forensic perspective, SuccessFactors' additional terms impose obligations that are technically infeasible, making compliance a virtual impossibility. See Declaration of Scott Cooper, Ex. 1 (SuccessFactors' proposed order).

Many of the provisions of SuccessFactors' proposed order are essentially identical to those in Softscape's proposed order. However, some or all of the terms in paragraphs 4, 6 and 7 of SuccessFactors' order improperly deviate from the parties' preservation obligations under

1 applicable law. SuccessFactors' proposed paragraph 4 would require *outside counsel* for
 2 Softscape to certify under oath that certain preservation actions have been taken by Softscape of
 3 which counsel does not have personal knowledge and should not be required to certify.
 4 SuccessFactors' proposed paragraph 6 would require only Softscape's counsel to notify an
 5 unidentified group of broadly defined third parties ("agents . . . and all persons acting in concert
 6 with or for Softscape") that they must locate and preserve evidence.² *Id.* Finally, SuccessFactors'
 7 proposed paragraph 7 impermissibly imposes a duty beyond that required by law. Significantly,
 8 each of the nine specified categories in this paragraph is subsumed and covered by paragraphs 1 -
 9 5 in Softscape's proposed order. Further complicating the issue is the fact that SuccessFactors'
 10 proposed paragraph 7 and its nine subdivisions is technically infeasible from a computer forensic
 11 perspective. *See* Cooper Decl. ¶¶ 7 - 21.

12 During the parties' meet and confer discussions, counsel for SuccessFactors frequently
 13 *claimed* that evidence is "being destroyed" and that counsel for Softscape has not been responsive.
 14 However, Softscape's efforts to preserve evidence and provide information belie the unfounded
 15 claims of SuccessFactors.

16 **III. TREATMENT OF "AEO" MATERIALS UNDER THE PROTECTIVE ORDER**

17 SuccessFactors has proposed a protective order that deviates from the Northern District's
 18 model Protective Order concerning the identity of persons who may view Attorneys' Eyes Only
 19 ("AEO") material. *Compare* Ex. B (Softscape's proposed Protective Order) *with* Ex. C
 20 (SuccessFactors proposed Protective Order showing changes).

21 First, SuccessFactors proposes to include "consultants" as persons to whom AEO materials
 22 may be provided (Ex. C, ¶ 7.3(a); ¶ 2.13), and to permit its *non-attorney* employee James
 23 Matheson to review certain AEO materials. Ex. C, ¶ 7.3(g). Neither provision is warranted. The
 24 term "consultant" is already included in the model Protective Order's definition of an "expert."
 25 *See* Ex. B, ¶ 2.13. And an expert (including a consultant) cannot, by definition, be "a past or a

26
 27 ² Softscape's proposed order requires *both* parties to exercise reasonable efforts to identify and request that
 28 non-parties who may possess discoverable materials preserve them. (Ex. A, ¶ 8).

1 current employee of a Party or of a competitor of a Party[.]” *Id.* SuccessFactors’ proposal would
 2 frustrate the very purpose of the AEO classification, *i.e.*, to prevent past and present employees or
 3 competitors in the industry from reviewing a Party’s trade secret or other sensitive information.

4 SuccessFactors’ proposal is not saved by its offer to subject proposed employee
 5 consultants to the requirements of Paragraph 7.4 because it still enables an employee or competitor
 6 to gain access to AEO material, a risk eliminated by the model Protective Order. As for Mr.
 7 Matheson, the parties had agreed on an *ad hoc* basis – before the March 28, 2008 hearing – to
 8 allow him to view materials produced by non-party Verizon in response to SuccessFactors’ Rule
 9 45 subpoena. The materials produced by Verizon bear little relationship to AEO information as
 10 defined by the parties. Furthermore, the *ad hoc* agreement involving Mr. Matheson was expressly
 11 limited by SuccessFactors to “Verizon’s production pursuant to its subpoena.”

12 SuccessFactors has also postulated that Softscape may “over-designate” materials as AEO.
 13 However, there is simply no merit to this claim because the parties have adopted the model
 14 Protective Order’s procedure for challenging AEO designations. Exs. B & C, ¶¶ 5.1, 6.
 15 Therefore, Softscape respectfully submits that the Court should adopt Softscape’s proposed
 16 Protective Order in this action.

17 **IV. EARLY DOCUMENT PRODUCTION**

18 This Court opened discovery on March 27, 2008. On Friday, March 28, 2008,
 19 SuccessFactors purported to serve its First Set of Requests for Production of Documents (the set
 20 SuccessFactors now seeks to expedite) *by e-mail* despite the absence of a written agreement to
 21 such service. Fed. R. Civ. P. 5(b)(2)(E). Softscape notified opposing counsel of its error, agreed
 22 to future electronic service in writing, offered to *deem* the document requests as served on April 1,
 23 2008, offered to *waive* the extra three days provided by Fed. R. Civ. P. 6(d), and agreed to respond
 24 by May 1, 2008. Softscape also offered to begin a rolling production of responsive documents in
 25 advance of May 1, 2008, if possible, and is in the process of identifying and collecting such
 26 materials.

27 Despite these reasonable compromises by Softscape, SuccessFactors demands that the
 28 document production begin by April 18 – *less than 3 weeks after these overbroad requests were*

1 served. This Court denied SuccessFactors' earlier request for expedited discovery and, instead,
 2 permitted the parties to commence formal discovery. *See* Order, Docket No. 70, at p. 15.
 3 SuccessFactors relies on the Court's minute order from March 27, 2008 when arguing that
 4 expedited discovery has been ordered, overlooking the fact that the minute order simply instructed
 5 the parties to "meet and confer on 4/10 to come up with discovery plan re early document
 6 production." *See* Minute Order (Docket No. 67). Softscape submits that there is no basis for
 7 requiring that it produce documents when SuccessFactors would otherwise receive responses in
 8 approximately two weeks, especially in light of Softscape's offer to begin its rolling production of
 9 responsive documents on or before May 1, 2008.

10 V. ACCELERATION OF THE INITIAL DISCLOSURES

11 This Court has already considered, *and rejected*, SuccessFactors' suggestion that Initial
 12 Disclosures should be expedited in this case. *See* Transcript (Docket No. 71) at p. 43:15-20.
 13 SuccessFactors has resurrected its previously denied request and now seeks to expedite the Initial
 14 Disclosure due date from June 10, 2008 to April 18, 2008. Not only was *any* acceleration of
 15 Initial Disclosure previously rejected by this Court, but SuccessFactors' proposed date is
 16 unreasonable. As this Court is aware, because of the breadth of the Initial Disclosures, preparing
 17 for them is a substantial undertaking. Softscape has offered a reasonable compromise of witness
 18 identification by May 9, 2008 and document identification by May 16, 2008. If the Court is
 19 inclined to expedite the Initial Disclosures, Softscape submits that its compromise is reasonable.

20
 21 Dated: April 14, 2008

Respectfully submitted

22 TAYLOR & COMPANY LAW OFFICES, LLP

23
 24 By: /s/ Jessica L. Grant
 25 Jessica L. Grant

26 Attorneys for Defendant SOFTSCAPE, INC.

EXHIBIT A

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13 SUCCESSFACTORS, INC.,

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Case No.: C-08-1376 (CW)

**[PROPOSED] ORDER TO PRESERVE
EVIDENCE**

1 Upon consideration of the parties positions and argument, it is ordered that:

2 1. The Parties shall take reasonable steps to identify and locate, and then to preserve
3 documents, data, tangible things, and other discoverable materials within the scope of Fed. R. Civ.
4 P. 26(b) and 34(a) that are reasonably known to exist and are related to the issues presented by the
5 action.

6 2. "Identify" is to be interpreted to mean the taking such reasonable steps as necessary
7 to evaluate the locations where materials reasonably anticipated to be subject to discovery in this
8 action may be stored.

9 3. "Locate" is to be interpreted to mean the taking of such reasonable steps as
10 necessary to determine whether the locations described in Paragraph 2, above, actually contain
11 materials reasonably anticipated to be subject to discovery in this action.

12 4. "Preservation" is to be interpreted to mean accomplishing the goal of maintaining
13 the integrity of all documents, data, tangible things, and other discoverable materials reasonably
14 anticipated to be subject to discovery in this action. Preservation means taking reasonable steps to
15 prevent the partial or full destruction, alteration, testing, deletion, shredding, incineration, wiping,
16 relocation, migration, theft, or mutation of such material; as well as negligent or intentional
17 handling that would make material incomplete or inaccessible.

18 5. "Documents, data, tangible things, and other discoverable materials" shall include,
19 if they exist, writings, records, files, correspondence, reports, memoranda, calendars, diaries,
20 minutes, electronic messages (including, without limitation, chat or instant messaging) voicemail,
21 e-mail, telephone message records or logs, electronically stored information ("ESI"), computer
22 and network activity logs, hard drives, backup data, removable computer storage media such as
23 PDAs, flash memory, CD, DVDs, tapes, disks and cards, printouts, document image files, web
24 pages, databases, spreadsheets, software, books, ledgers, journals, orders, invoices, bills, vouchers,
25 checks, statements, worksheets, summaries, compilations, computations, charts, diagrams, graphic
26 presentations, drawings, films, digital or chemical process photographs, video, phonographic, tape
27 or digital records or transcripts thereof, drafts, jottings and notes. Information that serves to
28 identify or locate such materials, such as file inventories, file folders, indices and metadata, is also

1 included in this definition. The inclusion of a term in this list does not imply that the item exists in
2 a paper, electronic and/or other medium.

3 6. Counsel are directed to inquire of their respective clients if the business practices of
4 any party involve the routine destruction, recycling, relocation, or mutation of such materials and,
5 if so, direct the party, to the extent practicable for the pendency of this order, either to:

- 6 a. Halt such business processes;
7 b. Sequester or remove such material from the business process; or
8 c. Arrange for the preservation of complete and accurate duplicates or copies
9 of such material, suitable for later discovery if requested.

10 7. The lead counsel representing each party shall, within one week of this order,
11 submit to the Court under seal and pursuant to Fed. R. Civ. P. 11, a statement that the directive in
12 paragraph 4, above, has been carried out.

13 8. Counsel for the Parties shall notify their clients of their document preservation
14 obligations pursuant to federal law. Counsel shall also exercise reasonable efforts to indentify and
15 request that any non-party who may possess materials reasonably anticipated being subject to
16 discovery take reasonable measures to preserve such material.

17
18 IT IS SO ORDERED.

19
20 DATED: _____

HONORABLE CLAUDIA WILKEN
UNITED STATES DISTRICT COURT JUDGE

EXHIBIT B

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[PROPOSED] PROTECTIVE ORDER

This Order is meant to govern the use of, and protect from public disclosure, any non-public and confidential or proprietary information used or disclosed in this litigation.

1. PURPOSES AND LIMITATIONS

Disclosure and discovery activity in this action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation would be warranted. Accordingly, the parties hereby stipulate to and petition the Court to enter the following Stipulated Protective Order. The parties acknowledge that this Order does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords extends only to the limited information or items that are entitled under the applicable legal principles to treatment as

1 confidential. The parties further acknowledge, as set forth in Section 10, below, that this
2 Stipulated Protective Order creates no entitlement to file confidential information under seal.
3 Civil Local Rule 79-5 sets forth the procedures that must be followed and reflects the standards
4 that will be applied when a party seeks permission from the Court to file material under seal.

5 **2. DEFINITIONS**

6 **2.1 Party:** Any party to this action, including all of its officers, directors,
7 employees, consultants, retained experts, and outside counsel (and their support staff).

8 **2.2 Disclosure or Discovery Material:** All items or information, regardless of
9 the medium or manner generated, stored, or maintained (including, among other things, testimony,
10 transcripts, or tangible things) that are produced or generated in disclosures or responses to
11 discovery in this matter.

12 **2.3 “Confidential” Information or Items:** Information (regardless of how
13 generated, stored or maintained) or tangible things that qualify for protection under standards
14 developed under Federal Rule of Civil Procedure 26(c). This designation includes but is not
15 limited to information which the Designating Party (i) would not normally reveal to third parties
16 except in confidence or has undertaken with others to maintain in confidence, or (ii) believes in
17 good faith is confidential and/or protected by a right to privacy under federal or state law or any
18 other applicable privilege or right related to confidentiality or privacy. This designation does not
19 include information that was publicly known prior to disclosure, or that, after disclosure, becomes
20 publicly known as a result of publication by one having right to do so.

21 **2.4 “Highly Confidential – Attorneys’ Eyes Only” Information or Items:**
22 Extremely sensitive “Confidential Information or Items” whose disclosure to another Party or non-
23 party would create a substantial risk of competitive harm or serious injury that could not be
24 avoided by less restrictive means. This designation includes but is not limited to trade secrets;
25 technical data and other confidential research, development and production information relating to
26 the products or technology at issue in this case; financial, commercial, product planning,
27 engagement terms, and marketing information relating to the products or technology in this case;
28 personal information; intellectual property protection strategies and practices; and industry

1 analyses.

2 **2.5 “Highly Confidential – Outside Attorneys’ Eyes Only” Information or**
 3 **Items:** Extremely sensitive “Confidential Information or Items” whose disclosure to another
 4 Party or non-party would create a substantial risk of competitive harm or serious injury that could
 5 not be avoided by less restrictive means. This designation shall include: (i) trade secret or
 6 confidential lists of customers or prospective customers or lists of their contact information or
 7 their confidential and proprietary information; (ii) trade secret or confidential pricing; (iii) trade
 8 secret or information related to existing or proposed company financing, partnerships or mergers
 9 and acquisitions; or (iv) any trade secret or confidential non-price business terms for business
 10 proposals or contracts with existing or potential customers, partners and prospects.

11 **2.6 Receiving Party:** A Party that receives Disclosure or Discovery Material
 12 from a Producing Party.

13 **2.7 Producing Party:** A Party or non-party that produces Disclosure or
 14 Discovery Material in this action.

15 **2.8 Designating Party:** A Party or non-party that designates information or
 16 items that it produces in disclosures or in responses to discovery as “Confidential,” “Highly
 17 Confidential — Attorneys’ Eyes Only” or “Highly Confidential – Outside Attorneys’ Eyes Only.”

18 **2.9 Protected Material:** Any Disclosure or Discovery Material that is
 19 designated as “Confidential,” “Highly Confidential – Attorneys’ Eyes Only,” or as “Highly
 20 Confidential – Outside Attorneys’ Eyes Only.”

21 **2.10 Outside Counsel:** Attorneys who are not employees of a Party but who are
 22 retained to represent or advise a Party in this action.

23 **2.11 House Counsel:** Attorneys who are employees of a Party. For purposes of
 24 this Protective Order, it shall be Julian Ong for SuccessFactors, and Susan Mohr for Softscape.

25 **2.12 Counsel (without qualifier):** Outside Counsel and House Counsel (as well
 26 as their support staffs).

27 **2.13 Expert:** A person with specialized knowledge or experience in a matter
 28 pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert

1 witness or as a consultant in this action and who is not a past or a current employee, officer or
 2 director of a Party or of a competitor of a Party and who, at the time of retention, is not anticipated
 3 to become an employee, officer or director of a Party or a competitor of a Party. This definition
 4 includes a professional jury or trial consultant retained in connection with this litigation.

5 **2.14 Professional Vendors:** Persons or entities that provide litigation support
 6 services (*e.g.*, photocopying; videotaping; translating; preparing exhibits or demonstrations;
 7 organizing, storing, retrieving data in any form or medium; etc.) and their employees and
 8 subcontractors.

9 **2.15 Presentation:** Exhibit 1 of the Declaration of Robert Bernshteyn in
 10 Support of Plaintiff's Ex Parte Application for a Temporary Restraining Order and Order to Show
 11 Cause re Preliminary Injunction (Dkt. No. 30).

12 **3. SCOPE**

13 The protections conferred by this Stipulation and Order cover not only Protected Material
 14 (as defined above), but also any information copied or extracted therefrom, as well as all copies,
 15 excerpts, summaries, or compilations thereof, plus testimony, conversations, or presentations by
 16 parties or counsel to or in court or in other settings that might reveal Protected Material.

17 **4. DURATION**

18 Even after the termination of this litigation, the confidentiality obligations imposed by this
 19 Order shall remain in effect until a Designating Party agrees otherwise in writing, a court order
 20 otherwise directs, or the information is publicly disclosed as a result of publication by one having
 21 the right to do so. The Court shall retain jurisdiction to enforce the terms of the Order for a period
 22 of six months after final termination of the action.

23 **5. DESIGNATING PROTECTED MATERIAL**

24 **5.1 Exercise of Restraint and Care in Designating Material for Protection.**

25 Each Party or non-party that designates information or items for protection under this Order must
 26 take care to limit any such designation to specific material that qualifies under the appropriate
 27 standards. A Designating Party must take care to designate for protection only those parts of
 28 material, documents, items, or oral or written communications that qualify—so that other portions

1 of the material, documents, items, or communications for which protection is not warranted are
2 not swept unjustifiably within the ambit of this Order.

3 a. Mass, indiscriminate, or routinized designations are prohibited.
4 Designations that are shown to be clearly unjustified, or that have been made for an improper
5 purpose (e.g., to unnecessarily encumber or impede the case development process, or to impose
6 unnecessary expenses and burdens on other parties), expose the Designating Party to sanctions.
7 Counsel shall not designate any discovery material “CONFIDENTIAL”, “HIGHLY
8 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – OUTSIDE
9 ATTORNEYS’ EYES ONLY” without first making a good-faith determination that protection is
10 warranted.

11 b. If it comes to a Party’s or a non-party’s attention that information or
12 items that it designated for protection do not qualify for protection at all, or do not qualify for the
13 level of protection initially asserted, that Party or non-party must promptly notify all other parties
14 that it is withdrawing the mistaken designation.

15 c. Information or items concerning the following subjects are not to be
16 designated as “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY” including but not
17 limited to: (i) ownership/control of IP addresses 68.236.68.19, 82.108.171.66, 24.34.56.79 or
18 98.216.168.122 and the identity of any computer using those IP addresses; (ii) communication
19 from those IP addresses or Softscape, Inc. with SuccessFactors, Inc. servers; and (iii) the user
20 name “John Anonymous,” associated e-mail address “hcmknowledge2008a@gmail.com,” and all
21 communications from, with or concerning same.

22 **5.2 Manner and Timing of Designations.** Except as otherwise provided in
23 this Order (see, e.g., second paragraph of section 5.2(a), below), or as otherwise stipulated or
24 ordered, material that qualifies for protection under this Order must be clearly so designated
25 before the material is disclosed or produced. The Order shall apply to materials provided or
26 exchanged by the Parties prior to the signing of this Order.

27 Designation in conformity with this Order requires:

28 a. For information in documentary form (apart from transcripts of

depositions or other pretrial or trial proceedings), that the Producing Party affix the legend “CONFIDENTIAL”, “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY” at the bottom of each page that contains protected material. If only a portion or portions of the material on a page qualifies for protection, the Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate markings in the margins) and must specify, for each portion, the level of protection being asserted (“CONFIDENTIAL”, “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY”).

A Party or non-party that makes original documents or materials available for inspection need not designate them for protection until after the inspecting Party has indicated which material it would like copied and produced. During the inspection and before the designation, all of the material made available for inspection shall be deemed “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” After the inspecting Party has identified the documents it wants copied and produced, the Producing Party must determine which documents, or portions thereof, qualify for protection under this Order, then, before producing the specified documents, the Producing Party must affix the appropriate legend (“CONFIDENTIAL”, “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY”) at the bottom of each page that contains Protected Material. If only a portion or portions of the material on a page qualifies for protection, the Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate markings in the margins) and must specify, for each portion, the level of protection being asserted (either “CONFIDENTIAL”, “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY”).

b. For testimony given in deposition or in other pretrial or trial proceedings, that the Party or non-party offering or sponsoring the testimony identify on the record, before the close of the deposition, hearing, or other proceeding, all protected testimony, and further specify any portions of the testimony that qualify as “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” When it is impractical to identify separately each portion of

1 testimony that is entitled to protection, and when it appears that substantial portions of the
 2 testimony may qualify for protection, the Party or non-party that sponsors, offers, or gives the
 3 testimony may invoke on the record (before the deposition or proceeding is concluded) a right to
 4 have up to 20 days to identify the specific portions of the testimony as to which protection is
 5 sought and to specify the level of protection being asserted (“CONFIDENTIAL,” “HIGHLY
 6 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – OUTSIDE
 7 ATTORNEYS’ EYES ONLY”). Only those portions of the testimony that are appropriately
 8 designated for protection within the 20 days shall be covered by the provisions of this Stipulated
 9 Protective Order.

10 Transcript pages containing Protected Material must be separately bound by the court
 11 reporter, who must affix to the bottom of each such page the legend “CONFIDENTIAL,”
 12 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL –
 13 OUTSIDE ATTORNEYS’ EYES ONLY,” as instructed by the Party or non-party offering or
 14 sponsoring the witness or presenting the testimony.

15 c. For information produced in some form other than documentary,
 16 and for any other tangible items, that the Producing Party affix in a prominent place on the exterior
 17 of the container or containers in which the information or item is stored the legend
 18 “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL ATTORNEYS’ EYES ONLY” or “HIGHLY
 19 CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY.” If only portions of the
 20 information or item warrant protection, the Producing Party, to the extent practicable, shall
 21 identify the protected portions, specifying whether they qualify as “Confidential” or as “Highly
 22 Confidential — Attorneys’ Eyes Only” or “Highly Confidential – Outside Attorneys’ Eyes Only.”

23 **5.3 Inadvertent Failures to Designate.** If timely corrected, an inadvertent
 24 failure to designate qualified information or items as “Confidential” or “Highly Confidential —
 25 Attorneys’ Eyes Only” does not, standing alone, waive the Designating Party’s right to secure
 26 protection under this Order for such material. If material is appropriately designated as
 27 “Confidential,” “Highly Confidential — Attorneys’ Eyes Only” or “Highly Confidential – Outside
 28 Attorneys’ Eyes Only,” after the material was initially produced, the Receiving Party, on timely

1 notification of the designation, must make reasonable efforts to assure that the material is treated
2 in accordance with the provisions of this Order.

3 **6. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

4 **6.1 Timing of Challenges.** Unless a prompt challenge to a Designating Party's
5 confidentiality designation is necessary to avoid foreseeable substantial unfairness, unnecessary
6 economic burdens, or a later significant disruption or delay of the litigation, a Party does not
7 waive its right to challenge a confidentiality designation by electing not to mount a challenge
8 promptly after the original designation is disclosed.

9 **6.2 Meet and Confer.** A Party that elects to initiate a challenge to a
10 Designating Party's confidentiality designation must do so in good faith and must begin the
11 process by conferring directly (in voice to voice dialogue; other forms of communication are not
12 sufficient) with counsel for the Designating Party. In conferring, the challenging Party must
13 explain the basis for its belief that the confidentiality designation was not proper and must give the
14 Designating Party an opportunity to review the designated material, to reconsider the
15 circumstances, and, if no change in designation is offered, to explain the basis for the chosen
16 designation. A challenging Party may proceed to the next stage of the challenge process only if it
17 has engaged in this meet and confer process first.

18 **6.3 Judicial Intervention.** A Party that elects to press a challenge to a
19 confidentiality designation after considering the justification offered by the Designating Party may
20 file and serve a motion under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if
21 applicable) that identifies the challenged material and sets forth in detail the basis for the
22 challenge. Each such motion must be accompanied by a competent declaration that affirms that
23 the movant has complied with the meet-and-confer requirements imposed in the preceding
24 paragraph and that sets forth with specificity the justification for the confidentiality designation
25 that was given by the Designating Party in the meet-and-confer dialogue.

26 The burden of persuasion in any such challenge proceeding shall be on the Designating
27 Party. Until the court rules on the challenge, all parties shall continue to afford the material in
28 question the level of protection to which it is entitled under the Producing Party's designation.

1 **7. ACCESS TO AND USE OF PROTECTED MATERIAL**

2 **7.1 Basic Principles.** A Receiving Party may use Protected Material that is
 3 disclosed or produced by another Party or by a non-party in connection with this case only for
 4 prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be
 5 disclosed only to the categories of persons and under the conditions described in this Order. When
 6 the litigation has been terminated, a Receiving Party must comply with the provisions of section
 7 11, below ("FINAL DISPOSITION"). Protected Material must be stored and maintained by a
 8 Receiving Party at a location and in a secure manner that ensures that access is limited to the
 9 persons authorized under this Order.

10 **7.2 Disclosure of "CONFIDENTIAL" Information or Items.** Unless
 11 otherwise ordered by the court or permitted in writing by the Designating Party, a Receiving Party
 12 may disclose any information or item designated CONFIDENTIAL only to:

13 a. the Receiving Party's Outside Counsel of record in this action, as
 14 well as employees of said Counsel to whom it is reasonably necessary to disclose the information
 15 for this litigation;

16 b. the officers, directors, and employees (including House Counsel) of
 17 the Receiving Party to whom disclosure is reasonably necessary for this litigation;

18 c. Experts (as defined in this Order) of the Receiving Party to whom
 19 disclosure is reasonably necessary for this litigation and who have signed the "Agreement to Be
 20 Bound by Protective Order" (Exhibit A);

21 d. the Court and its personnel;

22 e. court reporters, their staffs, and professional vendors to whom
 23 disclosure is reasonably necessary for this litigation and who have signed the "Agreement to Be
 24 Bound by Protective Order" (Exhibit A);

25 f. during their depositions or at hearings, witnesses where it appears on
 26 the face of the document or other item or from other documents or testimony that the
 27 CONFIDENTIAL information or item has been received or authored by that witness, or
 28 communicated to that witness, or it otherwise appears on the face of the document or other item

1 that the document or item contains information about which it appears reasonably likely that the
2 witness has discoverable information. Witnesses shall not be permitted to retain copies of
3 CONFIDENTIAL materials or exhibits. Pages of transcribed deposition testimony or exhibits to
4 depositions that reveal Protected Material must be separately bound by the court reporter and may
5 not be disclosed to anyone except as permitted under this Stipulated Protective Order; and

6 g. the author of the document or the original source of the information.

7 **7.3 Disclosure of “HIGHLY CONFIDENTIAL — ATTORNEYS’ EYES**
8 **ONLY” Information or Items.** Unless otherwise ordered by the court or permitted in writing by
9 the Designating Party, a Receiving Party may disclose any information or item designated
10 “HIGHLY CONFIDENTIAL — ATTORNEYS’ EYES ONLY” only to:

11 a. the Receiving Party’s Outside Counsel of record in this action, as
12 well as employees of said Counsel to whom it is reasonably necessary to disclose the information
13 for this litigation;

14 b. no more than one House Counsel of a Receiving Party who have
15 signed the “Agreement to Be Bound by Protective Order” (Exhibit A), except that House Counsel
16 may not have access to the following documents, which are to be labeled “HIGHLY
17 CONFIDENTIAL — OUTSIDE ATTORNEYS’ EYES ONLY” as defined in paragraph 2.5 of
18 this Order;

19 c. Experts (as defined in this Order) (1) to whom disclosure is
20 reasonably necessary for this litigation, (2) who have signed the “Agreement to Be Bound by
21 Protective Order” (Exhibit A), and (3) as to whom the procedures set forth in paragraph 7.4,
22 below, have been followed;

23 d. the Court and its personnel;

24 e. court reporters, their staffs, and professional vendors to whom
25 disclosure is reasonably necessary for this litigation and who have signed the “Agreement to Be
26 Bound by Protective Order” (Exhibit A); and

27 f. the author of the document or the original source of the information.
28

1 **7.4 Procedures for Approving Disclosure of “HIGHLY CONFIDENTIAL**
 2 **— ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – OUTSIDE**
 3 **ATTORNEYS’ EYES ONLY” Information or Items to “Experts”**

4 a. Unless otherwise ordered by the Court or agreed in writing by the
 5 Designating Party, a Party that seeks to disclose to an Expert (as defined in this Order) any
 6 information or item that has been designated “HIGHLY CONFIDENTIAL — ATTORNEYS’
 7 EYES ONLY” or “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY” first
 8 must make a written request to the Designating Party that (1) sets forth the full name of the Expert
 9 and the city and state of his or her primary residence, (2) attaches a copy of the Expert’s current
 10 resume, (3) identifies the Expert’s current employer(s), and (4) lists any other cases or arbitrations
 11 in which the Expert has testified as an expert at trial or by deposition within the preceding four
 12 years.

13 b. A Party that makes a request and provides the information specified
 14 in the preceding paragraph may disclose the subject Protected Material to the identified Expert
 15 unless, within five court days of delivering the request, the Party receives a written objection from
 16 the Designating Party. Any such objection must set forth in detail the grounds on which it is
 17 based.

18 c. A Party that receives a timely written objection must meet and
 19 confer with the Designating Party (through direct voice to voice dialogue) to try to resolve the
 20 matter by agreement. If no agreement is reached, the Party seeking to make the disclosure to the
 21 Expert may file a motion as provided in Civil Local Rule 7 (and in compliance with Civil Local
 22 Rule 79-5, if applicable) seeking permission from the court to do so. Any such motion must
 23 describe the circumstances with specificity, set forth in detail the reasons for which the disclosure
 24 to the Expert is reasonably necessary, assess the risk of harm that the disclosure would entail and
 25 suggest any additional means that might be used to reduce that risk. In addition, any such motion
 26 must be accompanied by a competent declaration in which the movant describes the Parties’
 27 efforts to resolve the matter by agreement (i.e., the extent and the content of the meet and confer
 28 discussions) and sets forth the reasons advanced by the Designating Party for its refusal to approve

1 the disclosure.

2 In any such proceeding the Party opposing disclosure to the Expert shall bear the burden of
3 proving that the risk of harm that the disclosure would entail (under the safeguards proposed)
4 outweighs the Receiving Party's need to disclose the Protected Material to its Expert.

5 **8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN**
6 **OTHER LITIGATION.**

7 If a Receiving Party is served with a subpoena or an order issued in other litigation that
8 would compel disclosure of any information or items designated in this action as
9 "CONFIDENTIAL," "HIGHLY CONFIDENTIAL — ATTORNEYS' EYES ONLY" or
10 "HIGHLY CONFIDENTIAL — OUTSIDE ATTORNEYS' EYES ONLY," the Receiving Party
11 must so notify the Designating Party, in writing (by fax, if possible) immediately and in no event
12 more than three court days after receiving the subpoena or order. Such notification must include a
13 copy of the subpoena or court order.

14 The Receiving Party also must immediately inform in writing the Party who caused the
15 subpoena or order to issue in the other litigation that some or all the material covered by the
16 subpoena or order is the subject of this Protective Order. In addition, the Receiving Party must
17 deliver a copy of this Stipulated Protective Order promptly to the Party in the other action that
18 caused the subpoena or order to issue.

19 The purpose of imposing these duties is to alert the interested parties to the existence of
20 this Protective Order and to afford the Designating Party in this case an opportunity to try to
21 protect its confidentiality interests in the court from which the subpoena or order issued. The
22 Designating Party shall bear the burdens and the expenses of seeking protection in that court of its
23 confidential material — and nothing in these provisions should be construed as authorizing or
24 encouraging a Receiving Party in this action to disobey a lawful directive from another court.

25 **9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

26 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected
27 Material to any person or in any circumstance not authorized under this Stipulated Protective
28 Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the

1 unauthorized disclosures, (b) use its best efforts to retrieve all copies of the Protected Material, (c)
2 inform the person or persons to whom unauthorized disclosures were made of all the terms of this
3 Order, and (d) request such person or persons to execute the "Acknowledgment and Agreement to
4 Be Bound" that is attached hereto as Exhibit A.

5 **10. FILING PROTECTED MATERIAL**

6 Without written permission from the Designating Party or a court order secured
7 after appropriate notice to all interested persons, a Party may not file in the public record in this
8 action any Protected Material. A Party that seeks to file under seal any Protected Material must
9 comply with Civil Local Rule 79-5. Specifically, a party filing materials under seal shall place the
10 documents in a sealed envelope with instructions that the document is filed pursuant to the
11 Stipulated Protective Order and that the envelope is not to be opened absent further order of the
12 court. Additionally, the envelope should be labeled to identify the title of the case, the case
13 number, and the title of the document.

14 **11. FINAL DISPOSITION**

15 Unless otherwise ordered or agreed in writing by the Producing Party, within sixty
16 (60) days after the final termination of this action, each Receiving Party must return all Protected
17 Material to the Producing Party. As used in this subdivision, "all Protected Material" includes all
18 copies, abstracts, compilations, summaries or any other form of reproducing or capturing any of
19 the Protected Material. With permission in writing from the Designating Party, the Receiving
20 Party may destroy some or all of the Protected Material instead of returning it. Whether the
21 Protected Material is returned or destroyed, the Receiving Party must submit a written certification
22 to the Producing Party (and, if not the same person or entity, to the Designating Party) by the
23 sixty-day deadline that identifies (by category, where appropriate) all the Protected Material that
24 was returned or destroyed and that affirms that the Receiving Party has not retained any copies,
25 abstracts, compilations, summaries or other forms of reproducing or capturing any of the Protected
26 Material. Notwithstanding this provision, Counsel are entitled to retain an archival copy of all
27 pleadings, motion papers, transcripts, legal memoranda, correspondence or attorney work product,
28 even if such materials contain Protected Material. Any such archival copies that contain or

1 constitute Protected Material remain subject to this Protective Order as set forth in Section 4
 2 (“DURATION”), above.

3 **12. NO WAIVER OF PRIVILEGE**

4 If material subject to a claim of attorney-client privilege or work-product immunity
 5 is inadvertently produced, such production shall in no way prejudice or otherwise constitute a
 6 waiver of, or estoppel as to, any claim of privilege or work-product immunity for such
 7 information. If a Party has inadvertently produced material subject to a claim of immunity or
 8 privilege, then promptly following that Party’s written request identifying the material for which a
 9 claim of inadvertent production is made, that material shall be returned and all copies or
 10 reproductions of that material that may have been made shall be destroyed. The party returning
 11 such information may move the Court for an Order compelling production of such information,
 12 but the motion shall not assert as a ground for production the fact or circumstances of the
 13 inadvertent production.

14 **13. MISCELLANEOUS**

15 **13.1 Right to Further Relief.** Nothing in this Order abridges the right of any
 16 person to seek its modification by the Court in the future.

17 **13.2 Right to Assert Other Objections.** By stipulating to the entry of this
 18 Protective Order no Party waives any right it otherwise would have to object to disclosing or
 19 producing any information or item on any ground not addressed in this Stipulated Protective
 20 Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of
 21 the material covered by this Protective Order.

22 IT IS SO ORDERED.

23
 24 DATED: _____

 25 HONORABLE CLAUDIA WILKEN
 26 UNITED STATES DISTRICT COURT JUDGE
 27
 28

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____, of _____,
declare under penalty of perjury that I have read in its entirety and understand the Stipulated
Protective Order in the case of *SuccessFactors, Inc. v. Softscape, Inc.*, No. C 08-1376 CW. I agree
to comply with and to be bound by all the terms of this Stipulated Protective Order and I
understand and acknowledge that failure to so comply could expose me to sanctions and
punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner
any information or item that is subject to this Stipulated Protective Order to any person or entity
except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the
Northern District of California for the purpose of enforcing the terms of this Stipulated Protective
Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ of

as my California agent for service of process in connection with this action or any
proceedings related to enforcement of this Stipulated Protective Order.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____

EXHIBIT C

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12 Attorneys for Plaintiff SUCCESSFACTORS, INC.

13
14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 OAKLAND DIVISION
17

18 SUCCESSFACTORS, INC., a Delaware
corporation,

19 Plaintiff,

20 v.

21 SOFTSCAPE, INC., a Delaware
corporation, and DOES 1-10, inclusive,

22 Defendants.
23
24

Case No. C 08-1376 CW

**[PROPOSED] STIPULATED PROTECTIVE
ORDER**

25 This Order is meant to govern the use of, and protect from public disclosure, any
26 non-public and confidential or proprietary information used or disclosed in this litigation.

27 ///

28 ///

1 **1. PURPOSES AND LIMITATIONS**

2 Disclosure and discovery activity in this action are likely to involve production of
 3 confidential, proprietary, or private information for which special protection from public
 4 disclosure and from use for any purpose other than prosecuting this litigation would be warranted.
 5 Accordingly, the parties hereby stipulate to and petition the Court to enter the following
 6 Stipulated Protective Order. The parties acknowledge that this Order does not confer blanket
 7 protections on all disclosures or responses to discovery and that the protection it affords extends
 8 only to the limited information or items that are entitled under the applicable legal principles to
 9 treatment as confidential. The parties further acknowledge, as set forth in Section 10, below, that
 10 this Stipulated Protective Order creates no entitlement to file confidential information under seal.
 11 Civil Local Rule 79-5 sets forth the procedures that must be followed and reflects the standards
 12 that will be applied when a party seeks permission from the Court to file material under seal.

13 **2. DEFINITIONS**

14 **2.1. Party:** Any party to this action, including all of its officers, directors, employees,
 15 consultants, retained experts, and outside counsel (and their support staff).

16 **2.2. Disclosure or Discovery Material:** All items or information, regardless of the
 17 medium or manner generated, stored, or maintained (including, among other things, testimony,
 18 transcripts, or tangible things) that are produced or generated in disclosures or responses to
 19 discovery in this matter.

20 **2.3. "Confidential" Information or Items:** Information (regardless of how generated,
 21 stored or maintained) or tangible things that qualify for protection under standards developed
 22 under Federal Rule of Civil Procedure 26(c). This designation includes but is not limited to
 23 information which the Designating Party (i) would not normally reveal to third parties except in
 24 confidence or has undertaken with others to maintain in confidence, or (ii) believes in good faith is
 25 confidential and/or protected by a right to privacy under federal or state law or any other
 26 applicable privilege or right related to confidentiality or privacy. This designation does not include
 27 information that was publicly known prior to disclosure, or that, after disclosure, becomes publicly
 28 known as a result of publication by one having right to do so.

1 **2.4. “Highly Confidential – Attorneys’ Eyes Only” Information or Items:** Extremely
2 sensitive “Confidential Information or Items” whose disclosure to another Party or non-party would
3 create a substantial risk of competitive harm or serious injury that could not be avoided by less
4 restrictive means. This designation includes but is not limited to trade secrets; technical data and
5 other confidential research, development and production information relating to the products or
6 technology at issue in this case; financial, commercial, product planning, engagement terms, and
7 marketing information relating to the products or technology in this case; personal information;
8 intellectual property protection strategies and practices; and industry analyses.

9 **2.5 “Highly Confidential – Outside Attorneys’ Eyes Only” Information or Items:**
10 Extremely sensitive “Confidential Information or Items” whose disclosure to another Party or non-
11 party would create a substantial risk of competitive harm or serious injury that could not be avoided
12 by less restrictive means. This designation shall include: (i) trade secret or confidential lists of
13 customers or prospective customers or lists of their contact information or their confidential and
14 proprietary information; (ii) trade secret or confidential pricing; (iii) trade secret or information
15 related to existing or proposed company financing, partnerships or mergers and acquisitions; or (iv)
16 any trade secret or confidential non-price business terms for business proposals or contracts with
17 existing or potential customers, partners and prospects.

18 **2.6. Receiving Party:** A Party that receives Disclosure or Discovery Material from a
19 Producing Party.

20 **2.7. Producing Party:** A Party or non-party that produces Disclosure or Discovery
21 Material in this action.

22 **2.8. Designating Party:** A Party or non-party that designates information or items
23 that it produces in disclosures or in responses to discovery as “Confidential,” “Highly
24 Confidential — Attorneys’ Eyes Only” or “Highly Confidential – Outside Attorneys’ Eyes
25 Only.

26 **2.9. Protected Material:** Any Disclosure or Discovery Material that is designated as
27 “Confidential,” “Highly Confidential – Attorneys’ Eyes Only,” or as “Highly Confidential –
28 Outside Attorneys’ Eyes Only.

1 **2.10. Outside Counsel:** Attorneys who are not employees of a Party but who are
2 retained to represent or advise a Party in this action.

3 **2.11. House Counsel:** Attorneys who are employees of a Party. For purposes of this
4 Protective Order, it shall be Julian Ong for SuccessFactors, and Susan Mohr for Softscape.

5 **2.12. Counsel (without qualifier):** Outside Counsel and House Counsel (as well as
6 their support staffs).

7 **2.13. Expert:** A person with specialized knowledge or experience in a matter pertinent to
8 the litigation who has been retained by a Party or its counsel to serve as an expert witness or as a
9 consultant in this action and who is not a past or a current employee, officer or director of a Party or
10 of a competitor of a Party and who, at the time of retention, is not anticipated to become an
11 employee, officer or director of a Party or a competitor of a Party. This definition includes a
12 professional jury or trial consultant retained in connection with this litigation. If the expert or
13 consultant is a current employee of a Party, the retaining party shall comply with Section 7.4 below
14 before any "Attorney's Eyes Only" materials are disclosed.

15 **2.14. Professional Vendors:** Persons or entities that provide litigation support services
16 (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations; organizing,
17 storing, retrieving data in any form or medium; etc.) and their employees and subcontractors.

18 **2.15. Presentation:** Exhibit 1 of the Declaration of Robert Bernshteyn in Support of
19 Plaintiff's Ex Parte Application for a Temporary Restraining Order and Order to Show Cause re
20 Preliminary Injunction (Dkt. No. 30).

21 **3. SCOPE**

22 The protections conferred by this Stipulation and Order cover not only Protected Material
23 (as defined above), but also any information copied or extracted therefrom, as well as all copies,
24 excerpts, summaries, or compilations thereof, plus testimony, conversations, or presentations by
25 parties or counsel to or in court or in other settings that might reveal Protected Material.

26 **4. DURATION**

27 Even after the termination of this litigation, the confidentiality obligations imposed by this
28 Order shall remain in effect until a Designating Party agrees otherwise in writing, a court order

otherwise directs, or the information is publicly disclosed as a result of publication by one having the right to do so. The Court shall retain jurisdiction to enforce the terms of the Order for a period of six months after final termination of the action.

5. DESIGNATING PROTECTED MATERIAL

5.1. Exercise of Restraint and Care in Designating Material for Protection. Each Party or non-party that designates information or items for protection under this Order must take care to limit any such designation to specific material that qualifies under the appropriate standards. A Designating Party must take care to designate for protection only those parts of material, documents, items, or oral or written communications that qualify—so that other portions of the material, documents, items, or communications for which protection is not warranted are not swept unjustifiably within the ambit of this Order.

(a) Mass, indiscriminate, or routinized designations are prohibited. Designations that are shown to be clearly unjustified, or that have been made for an improper purpose (e.g., to unnecessarily encumber or impede the case development process, or to impose unnecessary expenses and burdens on other parties), expose the Designating Party to sanctions. Counsel shall not designate any discovery material “CONFIDENTIAL”, “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY” without first making a good-faith determination that protection is warranted.

(b) If it comes to a Party’s or a non-party’s attention that information or items that it designated for protection do not qualify for protection at all, or do not qualify for the level of protection initially asserted, that Party or non-party must promptly notify all other parties that it is withdrawing the mistaken designation.

(c) Information or items concerning the following subjects are not to be designated as “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY” including but not limited to: (i) ownership/control of IP addresses 68.236.68.19, 82.108.171.66, 24.34.56.79 or 98.216.168.122 and the identity of any computer using those IP addresses; (ii) communication from those IP addresses or Softscape, Inc. with SuccessFactors, Inc. servers; and (iii) the user

1 name "John Anonymous," associated e mail address "hcmknowledge2008a@gmail.com," and all
2 communications from, with or concerning same.

3 **5.2. Manner and Timing of Designations.** Except as otherwise provided in this
4 Order (see, e.g., second paragraph of section 5.2(a), below), or as otherwise stipulated or ordered,
5 material that qualifies for protection under this Order must be clearly so designated before the
6 material is disclosed or produced. The Order shall apply to materials provided or exchanged by
7 the Parties prior to the signing of this Order.

8 Designation in conformity with this Order requires:

9 (a) For information in documentary form (apart from transcripts of depositions
10 or other pretrial or trial proceedings), that the Producing Party affix the legend
11 "CONFIDENTIAL", "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" or
12 "HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY" at the bottom of each
13 page that contains protected material. If only a portion or portions of the material on a page
14 qualifies for protection, the Producing Party also must clearly identify the protected portion(s)
15 (e.g., by making appropriate markings in the margins) and must specify, for each portion, the
16 level of protection being asserted ("CONFIDENTIAL", "HIGHLY CONFIDENTIAL –
17 ATTORNEYS' EYES ONLY" or "HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS'
18 EYES ONLY").

19 A Party or non-party that makes original documents or materials available for inspection
20 need not designate them for protection until after the inspecting Party has indicated which
21 material it would like copied and produced. During the inspection and before the designation, all
22 of the material made available for inspection shall be deemed "HIGHLY CONFIDENTIAL –
23 ATTORNEYS' EYES ONLY." After the inspecting Party has identified the documents it wants
24 copied and produced, the Producing Party must determine which documents, or portions thereof,
25 qualify for protection under this Order, then, before producing the specified documents, the
26 Producing Party must affix the appropriate legend ("CONFIDENTIAL", "HIGHLY
27 CONFIDENTIAL – ATTORNEYS' EYES ONLY" or "HIGHLY CONFIDENTIAL –
28 OUTSIDE ATTORNEYS' EYES ONLY") at the bottom of each page that contains Protected

1 Material. If only a portion or portions of the material on a page qualifies for protection, the
2 Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate
3 markings in the margins) and must specify, for each portion, the level of protection being asserted
4 (either "CONFIDENTIAL", "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" or
5 "HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY").

6 (b) For testimony given in deposition or in other pretrial or trial proceedings, that
7 the Party or non-party offering or sponsoring the testimony identify on the record, before the close
8 of the deposition, hearing, or other proceeding, all protected testimony, and further specify any
9 portions of the testimony that qualify as "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES
10 ONLY." When it is impractical to identify separately each portion of testimony that is entitled to
11 protection, and when it appears that substantial portions of the testimony may qualify for protection,
12 the Party or non-party that sponsors, offers, or gives the testimony may invoke on the record (before
13 the deposition or proceeding is concluded) a right to have up to 20 days to identify the specific
14 portions of the testimony as to which protection is sought and to specify the level of protection
15 being asserted ("CONFIDENTIAL," "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES
16 ONLY" or "HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY"). Only those
17 portions of the testimony that are appropriately designated for protection within the 20 days shall be
18 covered by the provisions of this Stipulated Protective Order.

19 Transcript pages containing Protected Material must be separately bound by the court
20 reporter, who must affix to the bottom of each such page the legend "CONFIDENTIAL,"
21 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" or "HIGHLY CONFIDENTIAL –
22 OUTSIDE ATTORNEYS' EYES ONLY," as instructed by the Party or non-party offering or
23 sponsoring the witness or presenting the testimony.

24 (c) For information produced in some form other than documentary, and for
25 any other tangible items, that the Producing Party affix in a prominent place on the exterior of the
26 container or containers in which the information or item is stored the legend "CONFIDENTIAL,"
27 "HIGHLY CONFIDENTIAL ATTORNEYS' EYES ONLY" or "HIGHLY CONFIDENTIAL –
28 OUTSIDE ATTORNEYS' EYES ONLY." If only portions of the information or item warrant

1 protection, the Producing Party, to the extent practicable, shall identify the protected portions,
 2 specifying whether they qualify as “Confidential” or as “Highly Confidential — Attorneys’ Eyes
 3 Only” or “Highly Confidential – Outside Attorneys’ Eyes Only.”

4 **5.3. Inadvertent Failures to Designate.** If timely corrected, an inadvertent failure to
 5 designate qualified information or items as “Confidential” or “Highly Confidential — Attorneys’
 6 Eyes Only” does not, standing alone, waive the Designating Party’s right to secure protection
 7 under this Order for such material. If material is appropriately designated as “Confidential,”
 8 “Highly Confidential — Attorneys’ Eyes Only” or “Highly Confidential – Outside Attorneys’
 9 Eyes Only,” after the material was initially produced, the Receiving Party, on timely notification
 10 of the designation, must make reasonable efforts to assure that the material is treated in
 11 accordance with the provisions of this Order.

12 **6. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

13 **6.1. Timing of Challenges.** Unless a prompt challenge to a Designating Party’s
 14 confidentiality designation is necessary to avoid foreseeable substantial unfairness, unnecessary
 15 economic burdens, or a later significant disruption or delay of the litigation, a Party does not waive
 16 its right to challenge a confidentiality designation by electing not to mount a challenge promptly
 17 after the original designation is disclosed.

18 **6.2. Meet and Confer.** A Party that elects to initiate a challenge to a Designating
 19 Party’s confidentiality designation must do so in good faith and must begin the process by
 20 conferring directly (in voice to voice dialogue; other forms of communication are not sufficient)
 21 with counsel for the Designating Party. In conferring, the challenging Party must explain the
 22 basis for its belief that the confidentiality designation was not proper and must give the
 23 Designating Party an opportunity to review the designated material, to reconsider the
 24 circumstances, and, if no change in designation is offered, to explain the basis for the chosen
 25 designation. A challenging Party may proceed to the next stage of the challenge process only if it
 26 has engaged in this meet and confer process first.

27 **6.3. Judicial Intervention.** A Party that elects to press a challenge to a confidentiality
 28 designation after considering the justification offered by the Designating Party may file and serve a

1 motion under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) that
 2 identifies the challenged material and sets forth in detail the basis for the challenge. Each such
 3 motion must be accompanied by a competent declaration that affirms that the movant has complied
 4 with the meet-and-confer requirements imposed in the preceding paragraph and that sets forth with
 5 specificity the justification for the confidentiality designation that was given by the Designating
 6 Party in the meet-and-confer dialogue.

7 The burden of persuasion in any such challenge proceeding shall be on the Designating
 8 Party. Until the court rules on the challenge, all parties shall continue to afford the material in
 9 question the level of protection to which it is entitled under the Producing Party's designation.

10 **7. ACCESS TO AND USE OF PROTECTED MATERIAL**

11 **7.1. Basic Principles.** A Receiving Party may use Protected Material that is disclosed
 12 or produced by another Party or by a non-party in connection with this case only for prosecuting,
 13 defending, or attempting to settle this litigation. Such Protected Material may be disclosed only
 14 to the categories of persons and under the conditions described in this Order. When the litigation
 15 has been terminated, a Receiving Party must comply with the provisions of section 11, below
 16 ("FINAL DISPOSITION"). Protected Material must be stored and maintained by a Receiving
 17 Party at a location and in a secure manner that ensures that access is limited to the persons
 18 authorized under this Order.

19 **7.2. Disclosure of "CONFIDENTIAL" Information or Items.** Unless otherwise
 20 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may
 21 disclose any information or item designated CONFIDENTIAL only to:

22 (a) the Receiving Party's Outside Counsel of record in this action, as well as
 23 employees of said Counsel to whom it is reasonably necessary to disclose the information for
 24 this litigation (assuming any such consultant has first signed the "Agreement to Be Bound by
 25 Protective Order" (Exhibit A));

26 (b) the officers, directors, and employees (including House Counsel) of the
 27 Receiving Party to whom disclosure is reasonably necessary for this litigation;
 28

(c) Experts including consultants (as defined in this Order) of the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed the "Agreement to Be Bound by Protective Order" (Exhibit A);

(d) the Court and its personnel;

(e) court reporters, their staffs, and professional vendors to whom disclosure is reasonably necessary for this litigation and who have signed the "Agreement to Be Bound by Protective Order" (Exhibit A);

(f) during their depositions or at hearings, witnesses where it appears on the face of the document or other item or from other documents or testimony that the CONFIDENTIAL information or item has been received or authored by that witness, or communicated to that witness, or it otherwise appears on the face of the document or other item that the document or item contains information about which it appears reasonably likely that the witness has discoverable information. Witnesses shall not be permitted to retain copies of CONFIDENTIAL materials or exhibits. Pages of transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this Stipulated Protective Order; and

(g) the author of the document or the original source of the information.

7.3. Disclosure of "HIGHLY CONFIDENTIAL — ATTORNEYS' EYES ONLY"

Information or Items. Unless otherwise ordered by the court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated "HIGHLY CONFIDENTIAL — ATTORNEYS' EYES ONLY" only to:

(a) the Receiving Party's Outside Counsel of record in this action, as well as employees and consultants of said Counsel to whom it is reasonably necessary to disclose the information for this litigation (assuming any such consultant has first signed the "Agreement to Be Bound by Protective Order" (Exhibit A));

(b) no more than one House Counsel of a Receiving Party who have signed the "Agreement to Be Bound by Protective Order" (Exhibit A), except that House Counsel may not

1 have access to the following documents, which are to be labeled "HIGHLY CONFIDENTIAL —
2 OUTSIDE ATTORNEYS' EYES ONLY" as defined in paragraph 2.5 of this Order;

3 (c) Experts including consultants (as defined in this Order) (1) to whom
4 disclosure is reasonably necessary for this litigation, (2) who have signed the "Agreement to Be
5 Bound by Protective Order" (Exhibit A), and (3) as to whom the procedures set forth in paragraph
6 7.4, below, have been followed;

7 (d) the Court and its personnel;

8 (e) court reporters, their staffs, and professional vendors to whom disclosure is
9 reasonably necessary for this litigation and who have signed the "Agreement to Be Bound by
10 Protective Order" (Exhibit A); and

11 (f) the author of the document or the original source of the information.

12 (g) James Matheson, Director of Web Operations of SuccessFactors, Inc. to the
13 extent that the designated information or item concerns (i) ownership/control of IP addresses
14 68.236.68.19 or 82.108.171.66 or 24.34.56.79 or 98.216.168.122 and the identity of any computer
15 using those IP addresses, (ii) communication from those IP addresses or New Milenium Shoe or
16 Softscape, Inc. with SuccessFactors, Inc. servers in or after February 2007, (iii) the user name
17 "John Anonymous," associated e mail address "homknowledge2008a@gmail.com," and all
18 communications from, with or concerning same, or (iv) documents or portions of documents
19 relating to SuccessFactors-related communications, business proposals, or meetings that contain
20 the following terms: ely@newmileniumshoe.com, Ely Valls, and/or Javier Cruz. Outside
21 Counsel for SuccessFactors, Inc. will inform Outside Counsel for Softscape, Inc. of the Bates
22 range of material provided to the Director of Web Operations, who may view this information
23 and these items only subject to the following conditions:

- 24 1. He may only load the designated information or item on a stand
25 alone computer.
- 26 2. He may not transmit, save, or store the designated information or
27 item on any SuccessFactors, Inc. networks or computers or his own
28

personal computer (or any other computer beyond the stand alone computer).

3. He may not discuss or use the designated information or item in any context outside of this lawsuit and may not discuss, disclose, and/or provide the information with any SuccessFactors, Inc. personnel.

4. At any time he is accessing the documents, whether in paper form or on the stand alone computer, he will be supervised by an attorney or paralegal of SuccessFactors, Inc.'s Outside Counsel to ensure compliance with these terms. No supervision is required except while he is working with any material designated "HIGHLY CONFIDENTIAL—ATTORNEYS' EYES ONLY."

5. SuccessFactors, Inc.'s Outside Counsel will retain exclusive possession, custody, and control of the designated information and items at all times, including any placed on the stand alone computer.

7.4. Procedures for Approving Disclosure of "HIGHLY CONFIDENTIAL — ATTORNEYS' EYES ONLY" or "HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY" Information or Items to "Experts"

(a) Unless otherwise ordered by the Court or agreed in writing by the Designating Party, a Party that seeks to disclose to an "Expert" (as defined in this Order) a testifying expert any information or item that has been designated "HIGHLY CONFIDENTIAL — ATTORNEYS' EYES ONLY" or "HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY" first must make a written request to the Designating Party that (1) sets forth the full name of the testifying eExpert and the city and state of his or her primary residence, (2) attaches a copy of the testifying eExpert's current resume, (3) identifies the testifying eExpert's current employer(s), and (4) lists any other cases or arbitrations in which the testifying eExpert has testified as an expert at trial or by deposition within the preceding four years.

(b) A Party that makes a request and provides the information specified in the preceding paragraph may disclose the subject Protected Material to the identified Expert unless, within five court days of delivering the request, the Party receives a written objection from the Designating Party. Any such objection must set forth in detail the grounds on which it is based.

(c) A Party that receives a timely written objection must meet and confer with the Designating Party (through direct voice to voice dialogue) to try to resolve the matter by agreement. If no agreement is reached, the Party seeking to make the disclosure to the Expert may file a motion as provided in Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) seeking permission from the court to do so. Any such motion must describe the circumstances with specificity, set forth in detail the reasons for which the disclosure to the Expert is reasonably necessary, assess the risk of harm that the disclosure would entail and suggest any additional means that might be used to reduce that risk. In addition, any such motion must be accompanied by a competent declaration in which the movant describes the Parties' efforts to resolve the matter by agreement (i.e., the extent and the content of the meet and confer discussions) and sets forth the reasons advanced by the Designating Party for its refusal to approve the disclosure.

In any such proceeding the Party opposing disclosure to the Expert shall bear the burden of proving that the risk of harm that the disclosure would entail (under the safeguards proposed) outweighs the Receiving Party's need to disclose the Protected Material to its Expert.

8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION.

If a Receiving Party is served with a subpoena or an order issued in other litigation that would compel disclosure of any information or items designated in this action as "CONFIDENTIAL," "HIGHLY CONFIDENTIAL — ATTORNEYS' EYES ONLY" or "HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS' EYES ONLY," the Receiving Party must so notify the Designating Party, in writing (by fax, if possible) immediately and in no event more than three court days after receiving the subpoena or order. Such notification must include a copy of the subpoena or court order.

1 The Receiving Party also must immediately inform in writing the Party who caused the
2 subpoena or order to issue in the other litigation that some or all the material covered by the
3 subpoena or order is the subject of this Protective Order. In addition, the Receiving Party must
4 deliver a copy of this Stipulated Protective Order promptly to the Party in the other action that
5 caused the subpoena or order to issue.

6 The purpose of imposing these duties is to alert the interested parties to the existence of
7 this Protective Order and to afford the Designating Party in this case an opportunity to try to
8 protect its confidentiality interests in the court from which the subpoena or order issued. The
9 Designating Party shall bear the burdens and the expenses of seeking protection in that court of its
10 confidential material — and nothing in these provisions should be construed as authorizing or
11 encouraging a Receiving Party in this action to disobey a lawful directive from another court.

12 **9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

13 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected
14 Material to any person or in any circumstance not authorized under this Stipulated Protective
15 Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the
16 unauthorized disclosures, (b) use its best efforts to retrieve all copies of the Protected Material, (c)
17 inform the person or persons to whom unauthorized disclosures were made of all the terms of this
18 Order, and (d) request such person or persons to execute the “Acknowledgment and Agreement to
19 Be Bound” that is attached hereto as Exhibit A.

20 **10. FILING PROTECTED MATERIAL**

21 Without written permission from the Designating Party or a court order secured after
22 appropriate notice to all interested persons, a Party may not file in the public record in this action
23 any Protected Material. A Party that seeks to file under seal any Protected Material must comply
24 with Civil Local Rule 79-5. Specifically, a party filing materials under seal shall place the
25 documents in a sealed envelope with instructions that the document is filed pursuant to the
26 Stipulated Protective Order and that the envelope is not to be opened absent further order of the
27 court. Additionally, the envelope should be labeled to identify the title of the case, the case
28 number, and the title of the document.

11. FINAL DISPOSITION

Unless otherwise ordered or agreed in writing by the Producing Party, within sixty (60) days after the final termination of this action, each Receiving Party must return all Protected Material to the Producing Party. As used in this subdivision, "all Protected Material" includes all copies, abstracts, compilations, summaries or any other form of reproducing or capturing any of the Protected Material. With permission in writing from the Designating Party, the Receiving Party may destroy some or all of the Protected Material instead of returning it. Whether the Protected Material is returned or destroyed, the Receiving Party must submit a written certification to the Producing Party (and, if not the same person or entity, to the Designating Party) by the sixty-day deadline that identifies (by category, where appropriate) all the Protected Material that was returned or destroyed and that affirms that the Receiving Party has not retained any copies, abstracts, compilations, summaries or other forms of reproducing or capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to retain an archival copy of all pleadings, motion papers, transcripts, legal memoranda, correspondence or attorney work product, even if such materials contain Protected Material. Any such archival copies that contain or constitute Protected Material remain subject to this Protective Order as set forth in Section 4 ("DURATION"), above.

12. NO WAIVER OF PRIVILEGE

If material subject to a claim of attorney-client privilege or work-product immunity is inadvertently produced, such production shall in no way prejudice or otherwise constitute a waiver of, or estoppel as to, any claim of privilege or work-product immunity for such information. If a Party has inadvertently produced material subject to a claim of immunity or privilege, then promptly following that Party's written request identifying the material for which a claim of inadvertent production is made, that material shall be returned and all copies or reproductions of that material that may have been made shall be destroyed. The party returning such information may move the Court for an Order compelling production of such information, but the motion shall not assert as a ground for production the fact or circumstances of the inadvertent production.

13. MISCELLANEOUS

13.1. Right to Further Relief. Nothing in this Order abridges the right of any person to seek its modification by the Court in the future.

13.2. Right to Assert Other Objections. By stipulating to the entry of this Protective Order no Party waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of the material covered by this Protective Order.

Dated: April __, 2008

FENWICK & WEST LLP

By: _____

Patrick E. Premo
Attorneys for Plaintiff SUCCESSFACTORS, INC.

Dated: April __, 2008

TAYLOR & COMPANY LAW OFFICES, LLP

By: _____

Jessica L. Grant
Attorneys for Defendant SOFTSCAPE, INC.

PURSUANT TO STIPULATION, IT IS SO ORDERED.

Dated: April __, 2008

The Honorable Claudia Wilken
United States District Court Judge

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

EXHIBIT A**ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND**

I, _____, of _____,

declare under penalty of perjury that I have read in its entirety and understand the Stipulated Protective Order in the case of *SuccessFactors, Inc. v. Softscape, Inc.*, No. C 08-1376 CW. I agree to comply with and to be bound by all the terms of this Stipulated Protective Order and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner any information or item that is subject to this Stipulated Protective Order to any person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the Northern District of California for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ of _____

as my California agent for service of process in connection with this action or any proceedings related to enforcement of this Stipulated Protective Order.

Date:

City and State where sworn and signed:

Printed name:

Signature:

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